November 20, 1989

MEMORANDUM

TO: Jeremy T. Harrison, Dean
William S. Richardson School of Law

FROM: Hugh R. Jones, Staff Attorney
Office of Information Practices

SUBJECT: Confidentiality of Names of Persons Serving on Admissions Committee for William S. Richardson School of Law

This is in response to your request for an advisory opinion from the Office of Information Practices concerning whether the names of the members of the Admissions Committee for the William S. Richardson School of Law ("Law School") are protected from disclosure under the Uniform Information Practices Act (Modified) ("UIPA"), Chapter 92F, Hawaii Revised Statutes.

ISSUE PRESENTED

Whether government records containing the names of the members of the Law School's Admissions Committee must be made available for public inspection and copying under the UIPA.

BRIEF ANSWER

Yes. If the names of the Admissions Committee members are contained within "government records" maintained by the Law School, then their identities must be made public. This can be accomplished by allowing inspection and copying of records, or segregated portions of records, during normal business hours.

Such information does not fall within any exception to the UIPA which would permit the Law School to withhold disclosure of such information. Specifically, the disclosure of this information would not constitute a "clearly unwarranted invasion of personal privacy", under Section 92F-13(1), Hawaii Revised Statutes. Further, we conclude that records containing the identities of Committee members do not constitute government records "that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" under Section 92F-13(3), Hawaii Revised Statutes, provided that any confidential information has been deleted from the record.

FACTS

The Law School has a policy of not disclosing the names of persons serving upon its student Admissions Committee. Of the six Admissions Committee members, three are faculty members, two are students popularly elected by the student body, and one is the Assistant Dean in charge of admissions and placement.

By virtue of their election, the names of the student members of the Admissions Committee are known within the Law School, although their names are generally not well known outside the Law School. Faculty members of the Committee generally serve staggered terms. Given the time consuming demands placed upon Committee members, most faculty prefer to serve no more than a one year term. Vacancies and openings in the Committee's faculty positions are filled by appointment of the Dean with the advise and consent of the faculty.

This academic year, the Law School received approximately 460 admissions applications for approximately 75 student openings.[1] In the past it has not been uncommon for applicants, their relatives and friends to attempt to make personal "sales pitches" during the admissions process, given the scarcity of spots available for first year law students.

[1] Of this number, approximately 10-12 applicants are accepted into a pre-admissions program targeted at traditionally disadvantaged students. These students are given special tutorial classes and study selected first year curricula. Upon successful completion of the program, they are automatically accepted into the first year class for the following academic year.

Recently, the Law School received a request under the UIPA by a member of the public for the disclosure of the names of persons serving upon the Admissions Committee along with copies of all admissions policies. The Law School provided the requestor with a copy of its admissions policies, but has requested an Office of Information Practices advisory opinion concerning public accessibility to the names of persons serving upon the Admissions Committee under the UIPA. The Law School desires to keep such information confidential in order to: (1) avoid the public perception that personal influence is determinative in the admissions process; and (2) preclude any attempts to unfairly influence the process.

DISCUSSION

I. INTRODUCTION

The UIPA is the State's comprehensive new open records law, which became effective July 1, 1989. As set forth at Section 92F-2, Hawaii Revised Statutes, in enacting the UIPA, the Legislature concluded that "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." On the other hand, the Legislature also was sensitive to temper this policy of openness, by preserving "the right of the people to privacy, as embodied in Section 6 and Section 7 of Article I of the Constitution." Id.

Section 92F-11(a), Hawaii Revised Statutes sets forth the general requirement that "[a]ll government records are open to public inspection unless access is restricted or closed by law." "Government record" under the UIPA "means information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1988). "Agency" under the UIPA is defined broadly as:

> [a]ny unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not

> include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (Supp. 1988) (emphasis added).

The University of Hawaii is established as the State University and constitutes a "body corporate" under section 5 of Article X of the Constitution of the State of Hawaii and under Section 304-2, Hawaii Revised Statutes. Pursuant to Section 304-62, Hawaii Revised Statutes, the Legislature established the Law School at the University of Hawaii. Therefore, the Law School, as part of the University of Hawaii, is subject to the provisions of the UIPA, as an "agency" which maintains "government records." See also, Anthony v. Cleveland, 355 F. Supp. 789 (D. Haw. 1973) (that the University is an agency of the state government admits of no argument).

Section 92F-11(b), Hawaii Revised Statutes provides, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Section 92F-13, Hawaii Revised Statutes sets forth five exceptions to the general rule of open access to government records, only two of which appear relevant for resolving the question under consideration. This section provides in pertinent part:

> This chapter shall not require disclosure of:
>
> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
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> ....
>
> (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

Haw. Rev. Stat. § 92F-13(1), (3) (Supp. 1988).

For purposes of clarity, the exceptions created by Section

92F-13(1) and (3), Hawaii Revised Statutes shall be separately addressed below.

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-14(a), Hawaii Revised Statutes provides:

> Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual. [Emphasis added.]

Thus, this section requires a balancing of interests. The legislative history to Section 92F-14, Hawaii Revised Statutes clearly sets forth the intention of the Legislature that "[i]f the privacy interest is not `significant', a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

To the extent that the names of the student members of the Admissions Committee along with the name of the Assistant Dean are widely known within the Law School, it is difficult to find any significant privacy interest in the confidentiality of their names. That the student members of the Admissions Committee are elected by their peers in contested elections further suggests that no significant privacy interest is implicated by the disclosure of their names.

With respect to the three faculty members of the Admissions Committee, these persons are employed by the State, their salaries being paid by State taxpayers. In enacting the UIPA, the Legislature made a conscious decision to increase the public availability of information contained in government records relating to public employees. Under Section 92F-12 (a)(14), Hawii Revised Statutes, each agency must disclose:

> The name, compensation (but only the salary range for employees covered by Chapters 76,77, 297 or 304), job title, business address, business telephone number, job description, education and training

> background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit....

Thus, the Legislature concluded that government employees have only very limited privacy rights,[2] in details relating to their occupational status. As is stated in the UIPA's legislative history:

> In addition, however, the bill will provide, in [. 92F-12(a)], a list of records (or categories of records) which the legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy and for frustration of legitimate government purposes are inapplicable.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988) (emphasis added).

Thus, after considering the relative interests involved, the Legislature concluded that public employees have no significant privacy interest in many details relating to their employment, including but not limited to their name and job description. It therefore follows that the Legislature, consistent with the purpose of the UIPA that the "conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible", concluded that details relating to a person's public employment are affected with significant public interest. Accordingly, we believe that the fact that certain faculty members perform services upon the Admissions Committee should

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[2] See also, Report of the Governor's Committee on Public Records and Privacy, Volume I, 106 (1987) ("[T]here is less expectation of privacy for those who work in government."); Nakano v. Matayoshi, 68 Haw. 140, 706 P.2d 816 (1985).

be available for public disclosure and perhaps even included as standard language in the faculty members' job descriptions, if such descriptions exist.

Even assuming, however, that service upon the Law School's Admissions Committee is not a matter contained in a faculty member's job description, we conclude that a faculty member has no significant personal[3] privacy interest in such fact. Rather, this information is currently being withheld for the stated purpose of protecting institutional processes. On the other hand, we believe that there is more than a "scintilla" of public interest supporting the disclosure of this information. The legislative purposes sought to be achieved by passage of the UIPA included the enhancement of governmental accountability through a general policy of access to government records, including access to a plethora of information concerning those who are employed by the public. The UIPA also seeks to eliminate any possibility that the affairs of government are conducted in an atmosphere of secrecy. On balance, we conclude that disclosure of the names of the three faculty members serving upon the Admissions Committee would not constitute a "clearly unwarranted invasion of personal privacy." However, nothing under the UIPA requires the Law School Admissions Committee to grant personal interviews with any applicant or an applicant's representatative.

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

As noted previously, to the extent that service of faculty members upon the Law School's Admissions Committee might be noted in their job descriptions, the exemption provided by Section 92F-13(3), Hawaii Revised Statutes is inapplicable. See, S. Conf. Comm. Rep. No. 235, 14th Leg. Reg. Sess., Haw. S.J. 689, 690 (1988).

However, even assuming that Section 92F-12(a)(14), Hawaii Revised Statutes is inapplicable to these facts, the legislative history to the UIPA strongly suggests that the names of faculty serving upon the Admissions Committee is not the type of information, "which if disclosed, would frustrate a

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[3] Haw. Rev. Stat. . 92F-13(1) (Supp. 1988) was intended to protect the privacy of "individuals" not institutions.

legitimate government function." Although the exception set forth at Section 92F-13(3), Hawaii Revised Statutes is somewhat vague, the legislative history to the UIPA provides guidance as to which government records would fall within the ambit of this exception. Specifically, Senate Standing Committee Report No. 2580, dated March 31, 1988, provides:

> (b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.
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> (1) Records or information compiled for law enforcement purposes;
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> (2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination;
>
> (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;
>
> (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
>
> (5) Administrative or technical information, including software, operating protocols and employee manuals, which, if disclosed, would jeopardize the security of a record-keeping system;
>
> (6) Proprietary information, such as research methods, records and data, computer programs and software and

> other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
>
> (7) Trade secrets or confidential commercial and financial information;
>
> (8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and
>
> (9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

Stand. Com. Rep. No. 2850, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

A review of the above categories of government records considered by the Legislature to be eligible for protection from disclosure under Section 92F-13(3), Hawaii Revised Statutes indicates that records containing the names of faculty members serving upon the Law School Admissions Committee do not appear to fall within the enumerated examples. Of course, these are only examples in a non-exhaustive list. Another example of government records which if disclosed may result in the frustration of a legitimate government function are inter-agency and intra-agency memoranda or correspondence. Indeed, under the Freedom of Information Act, 5 U.S.C. . 552 (b)(5) an agency need not disclose "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[4]

In Environmental Protection Agency v. Mink, 410 U.S. 73, 87, 35 L. Ed. 2d 119, 132, 93 S. Ct. 827, 836 (1973), the Court,

[4] The legislative history suggests that "case law under the Freedom of Information Act should be consulted for additional guidance" in interpreting the UIPA. Stand. Com. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093 (1988).

in reviewing FOIA's legislative history, stated that Exemption (b)(5) was meant to protect from disclosure documents traditionally privileged from discovery in litigation the disclosure of which would be "injurious to the consultive functions of government."

The "deliberative process privilege rests most fundamentally on the belief that were agencies forced to `operate in a fishbowl', the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Dudman Communications v. Dept. of Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987) quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

However, in Mink, the Court emphasized that exemption 5(b) does not protect from disclosure, "purely factual material appearing in [government records] in a form that is severable without compromising the private remainder of the documents." Mink, 410 U.S. at 91, 35 L. Ed. 2d at 134, 93 S. Ct at 838.

Subsequent to the Mink decision, courts came to realize that use of the factual matter/deliberative matter distinction produced incorrect outcomes in a small number of cases. See, Lead Industries Association v. Occupational Safety and Health Administration, 610 F.2d 70, 86 (2nd Cir. 1979); Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

Thus, "[c]ourts therefore began to focus less on the nature of the materials sought and more on the effect of the materials release: the key question in Exemption 5 cases became whether disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Dudman, 815 F.2d at 1568.

However, the factual/deliberative distinction retains vitality in case law under Exemption 5. Thus far, the courts have only protected factual information from disclosure under two circumstances. The first circumstance occurs where a document employs specific facts out of a larger group of facts and this very act is deliberative in nature. See, Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974), Williams v. Department of Justice, 556 F. Supp. 63 (D.D.C. 1982). The second circumstance occurs where the information is so

inextricably connected to deliberative material that its disclosure will expose or cause harm to the agency's deliberations. If revealing factual information is tantamount to revealing the agency's deliberations, then the facts may be withheld. See e.g., Wolfe v. HHS, 839 F.2d 774 (D.C. Cir. 1988).

In turning to the question presented, disclosure of the names of faculty members who serve upon the Admissions Committee might subject the committee persons to the occasional unwanted overtures of the overzealous Law School applicant or persons acting on the applicant's behalf. The Law School's stated rationale for treating the members' identities as confidential is avoiding a public perception that applicants are chosen more upon "who they know" than "what they know." However, this has no impact on the outcome of whether the information should be public or confidential under the UIPA. The disclosure of the members' identities will not discourage candid discussion within the confines of the committee meetings, inhibit intra-committee debate or result in the premature disclosure of the recommended outcome of the deliberative process.

Further, while disclosure may cause some persons connected with the Committee to attempt to exert influence, Law School admissions professionals "should not pursue any activity that might compromise or seem to compromise their integrity or that of the admissions process." Law School Admissions Council, Statement of Good Admission Practices, 3 (1989). There are alternatives to keeping the identity of Committee members confidential in order to ensure the integrity of the Law School admissions process. In enacting the UIPA, the Legislature concluded that "[o]pening up government processes to public scrutiny ... is the only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. § 92F-2 (Supp. 1988). That law schools elsewhere and the University of Hawaii Medical School make public the names of persons serving upon their admissions committees without significant impairment of committee functions, strongly suggests that disclosure would not "frustrate a legitimate government function."

CONCLUSION

The disclosure of the names of the Admissions Committee members would not constitute a clearly unwarranted invasion of

personal privacy, because disclosure implicates no significant privacy interest and more than a scintilla of public interest exists supporting such disclosure. Similarly, the disclosure of such information would not frustrate a legitimate government function. Therefore, names of students and faculty members who serve upon the Law School's Admissions Committee, as contained in "government records", are subject to public disclosure under the UIPA, to the extent that other non-disclosable information has been segregated from such records.

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HRJ:sc
cc: Mr. Jahan Byrne

APPROVED:

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